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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 840

WARD MILLER,

Appellant,

vs.

DOCTOR ROBERT A. HAINES, DIRECTOR, DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, STATE OF OHIO, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

## BRIEF IN REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellant, Ward Miller, pursuant to Rule 16 (4) of the Revised Rules of the Supreme Court of the United States, files this brief in opposition to Appellees' Motion to Dismiss or Affirm for the reason that the grounds set forth therein alleged to be dispositive of this appeal have no basis in fact or law.

## ARGUMENT

Appellees' statement of grounds claimed to warrant dismissal by the Supreme Court of the United States of Ward Miller's appeal, or the affirming of the Franklin County, Ohio, Court of Appeals, as set forth in their motion to dismiss or affirm, are refuted in order of appearance therein.

**There is a Substantial Federal Question**

The Court is respectfully referred to pages 13 through 16 of Appellant's Jurisdictional Statement filed hereinbefore, wherein the substantialness of the questions involved in the landmark case of *Department of Mental Hygiene vs. Kirchner, Admx.*, 380 U.S. 194, as noted by the Supreme Court speaking through Justice Harlan, is reviewed. The Court may be quoted from that decision as follows:

> "... We granted Certiorari to consider the important questions involved." 379 U.S. 811 (380 U.S. 194 at page 196);

And further:

> "... we think the preferable course is to leave the way open for obtaining clarification from the California Supreme Court (*Minnesota vs. National Tea Co., supra*), in view of the importance and widespread interest in the case...." 380 U.S. 194 page 200.

As stated before, the Supreme Court of the United States has already determined the existence of a substantial federal question, which of course vitiates Appellees' contention that the appeal must be dismissed on this ground.

**The Judgment Does Not Rest On An Adequate Non-Federal Basis**

A careful search of Appellees' statement and argument failed to reveal any discussion of the "adequate non-federal basis" referred to in the body of the Motion to Dismiss or Affirm itself. However, as the alternative to the non-federal basis mentioned, Appellees continue with "... or in the alternative to affirm the judgment of the Franklin County, Ohio, Court of Appeals,'. By elimination, the judgment referred to as resting on an adequate non-federal basis must be the judgment of the Franklin County Court of Common

Pleas. In Appellant's Jurisdictional Statement on page 22 A, wherein Judge Harter's decision on the trial of the instant case was set out, the next to the last paragraph reads as follows:

> "For these reasons, I feel compelled to rule that Sections 5121.01 et seq., Revised Code of Ohio, (the so-called "pay-patient" statutes) are valid, and not in violation of Section 1, Article VII of the Constitution of Ohio, *or of the fourteenth Amendment to the Constitution of the United States, through a denial of the equal protection of the law, or in the taking of property without due process of law.*" (emphasis ours)

In *Kirchner,* the Supreme Court of the United States had difficulty in determining whether it was the State of California's Constitution or the Constitution of the United States that enabled the Supreme Court of California to strike down the "pay-patient" statutes of that State and remanded the case on that basis for clarification. There is no such confusion presented here, inasmuch as Judge Harter very definitely and specifically included the Federal Constitution and rejected the existence of denial of equal protection or due process of the law. As to whether or not the constitutional interpretation advanced by Judge Harter may be termed adequate on either a federal or non-federal basis, it would seem that his application of the Fourteenth Amendment to the present question as it stands is definitely inadequate; and for that reason deserves the privilege of adjudication that this Court may provide. It is emphatically urged that Appellee may not now attempt to select from context only that part of Judge Harter's decision applying the tests of the State Constitution to the statutes in question, so as to escape the natural consequences of his concurrent evaluation and determination of the constitutionality of the State statutes in the light of the Fourteenth Amendment to the Federal Constitution.

**The Questions Involved Are Not So Unsubstantial As To Not Need Further Argument**

The positive corollary to this sub-title as used in Appellees' motion can only be considered a self-serving but futile conclusion. The Court is once again respectfully referred to the comments encompassing the scope of public concern, the importance of the questions, and the widespread interest noted by the decision and footnotes to *Department of Mental Hygiene of California v. Kirchner, Admx.*, 380 U.S. 194.

**ARGUMENT IN GENERAL**

Moving hastily from the three specific grounds enumerated in their motion, Appellees strenuously contend in the body of their argument that:

> "Appellant, Ward Miller, has an adequate remedy at law, for if these statutes are unconstitutional as has been alleged, he would have a complete defense to an action of law brought for collection of the amounts assessed in accordance with the provisions of said statutes." (Appellees Motion to Dismiss or Affirm page 3)

On February 13th of 1961, Judge Dana F. Reynolds of the Common Pleas Court of Franklin County, Ohio, overruled a demurrer filed against Appellant's original petition on the basis that:

> ". . . there should be a showdown with respect to the constitutional question without waiting until after plaintiff's death or until the claimed obligation has reached such proportions as might seriously affect plaintiff's mentality." (Jurisdictional Statement, Appendix 25 A)

While Judge Reynolds recognized the importance of a constitutional determination, Appellees contend that Appellant has an adequate remedy at law by merely claiming the statutes unconstitutional; even though this determination has yet to be made and is, in fact, presently before this

Court for that purpose. The decision as to the "clear right" of an Appellant to the injunctive relief originally sought, was defined by Judge Reynolds when he overruled the demurrer and for once and all determined and forever set away consideration of this question. Having survived that onslaught, the question of unconstitutionality is yet completely open and under scrutiny; and will remain in an indeterminate state until such time as the Supreme Court of the United States adjudicates the final issue, save and excepting the apparent analogy of *Kirchner*. Obviously, with the Supreme Court of the State of Ohio having for all intent and purpose validated the determination of constitutionality in the Ohio Common Pleas Court, and with the Court of Appeals of Franklin County, Ohio, neatly dodging the issue with their confusing avoidance of any constitutional determination whatsoever, Appellant's position, if forced to refile his action as Appellees suggest, would be that of immediate flight before the tax collectors, or the imposition of a succession of appeal bonds that would be beyond his financial capability.

The page and a quarter of argument devoted to the obligation of a parent to support his minor incompetent child must fall mute before Article VII, Section 1 of the Ohio Constitution itself which reads:

> **"Section 1. Insane, blind and deaf and dumb.**
>
> Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly." (Article VII, Section I of Ohio Constitution)

In anticipation of protest by Appellees. the Court is referred to page 6 of Appellees' Motion to Dismiss or Affirm, wherein Counsel for Appellees concur in the conclusion that the present day mentally retarded individual is the vestige of the insane referred to in Article VII, Section 1

of the Ohio Constitution supra. If Appellees' contention of moral duty and legislative coagulation of imperfect moral obligation is to be given credence, then they must also explain away the state-wide and totally supported programs of institutionalization and care for the blind; and the magnificent schools, resident teacher programs, visiting rehabilitation staffs and other benefits established for the deaf and dumb by the same taxpayers "who never receive any direct or immediate benefits from such institutions." (Motion to Dismiss or Affirm, page 4). And in passing, it would be an oversight to omit the juvenile delinquents, the state supported and administered Boys' Industrial Schools, and the ever-increasing requirements from the responsibility on the state to police, care for, and protect society from other minor children of harassed parents who are incarcerated without benefit of any legislative imperfect moral obligation.

Again, Appellees cite *State ex rel Price v. Huwe*, 105 O.S. 304; *State vs. Webber, Adms.*, 163 O.S. 598, and *Rice, Guardian vs. State*, 14 O.App. 9, as being authority for the contention that the Ohio Courts have found the "pay-patient" statutes constitutional. Such could not be further from fact. *State ex rel Price v. Huwe* is not in point because it dealt with a mandamus action between governmental officials in variant political subdivisions. The Appellate Court in *Rice, Guardian vs. State* assumed that the parents and liable relatives of all of the Ohio Constitutional class of insane, blind, and deaf and dumb, were being assessed alike for their support in state institutions; and *State vs. Webber, Adms.*, while closer to home, did not consider the constitutional question as that issue was not raised in the Trial Court or the Court of Appeals. Consequently, the constitutionality of the statutes presently under consideration remains a confused uncertainty in the State of Ohio

and in some 40 of her sister states. The California Supreme Court in the *Kirchner* case, 36 Cal. Rptr. 488 on page 491 commented on the scarcity of authority, case law and resulting confusion:

> "... no case which squarely ... sustained such statutes in the light of the basic question as to equal protection of the law in a case wherein it was sought to impose liability upon one person for the support of another in a state institution ..." 36 Cal. Rptr. 488 at page 491.

Appellees criticize the California Supreme Court for overruling, without proper consideration, such cases as *Department of Mental Hygiene vs. McGilvery,* 50 Cal. 2d 742 329 P. 2d. 689; 3 *Beach v. District of Columbia,* 320 F 2d, 790 [D.C. Cir. 1963], and others. The decision in the *Beach* case, upon consideration, is found to rest solely on a due process argument without treatment of the equal protection requirement.

Appellees press to differentiate between the "pay-patient" statutes existent at the time of the *Kirchner* decision in California and those complained of in the case at bar, and attempt to distinguish *Kirchner* on this basis. However, contrary to Appellees' desire to curtail the scope of that decision, the California Supreme Court ruled those "pay-patient" statutes unconstitutional while imposing the liability of support on any relative designated by statute; and did not limit its effect to the support of a parent for an adult child as suggested. The citation above from the *Kirchner* case shows no such imagined distinction; for the California Supreme Court refers to the legislative purpose as being, "... a case wherein it was sought to impose liability upon one person for the support of another in a state institution." (36 Cal. Rptr. 488 at page 491.)

In closing, it is respectfully submitted that argument concerning joint and several liability and whether or not the

criteria of ability to pay are both inherent in the California and Ohio statutes is time consuming but futile. Section 5121.06 of the Ohio Revised Code sets forth the joint and several liability, and Section 6651 of the California Welfare and Institutions Code provides for reduction, cancellation and remission on the basis of an inability to pay. The two sets of "pay-patient" statutes are foursquare on these matters as are the constitutions of the two states. Furthermore, as the United States Supreme Court stated in its decision on *Kirchner*:

> "The California Supreme Court did not state whether its holding was based on the equal protection clause of the Fourteenth Amendment to the Constitution of the United States or the *equivalent* provision of the California Constitution or both." (380 U.S. 194 at page 196) (emphasis added)

We attach emphasis to the word "equivalent", and it is submitted that this similarity alone would give cause for the Supreme Court of the United States to take jurisdiction of this cause in light of the present attack on an analogous ruling of constitutionality imposing validity on the identical statutory provisions of a sister state. The question is no longer confined to California, and the geographical jurisdiction of that State's Supreme Court does not now remain the only area wherein the constitutional validity of an identical set of laws are presently receiving the benefit of judicial scrutiny. The forty-two states with similar statutes on their books, Puerto Rico, the District of Columbia and especially the nine state Attorney Generals who filed *amicus* briefs on the *Kirchner* matter, await the outcome of this appeal. (See footnote 8, 380 U.S. 194) This cause is a substantial federal question and of great and unusual public concern.

## CONCLUSION

It is respectfully requested that Appellees' Motion to Dismiss or Affirm be overruled for the reasons set forth herein.

Respectfully submitted,

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